IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ROBERT ALLEN JACKSON III, Appellant.	))))))))))	NO. 61529-7-I DIVISION ONE UNPUBLISHED OPINION FILED: May 18, 2009

Leach, J. — Robert Jackson III appeals his conviction for first degree rape. He contends that he was deprived of a fair trial when the prosecutor disparaged the role of defense counsel in her closing remarks. Jackson also argues that the trial court erred in admitting testimony about the victim's alcohol abuse one year after the alleged rape. Finally, Jackson claims that the trial court violated his right to a jury "of the county" and that his counsel provided ineffective assistance when his case was tried before a jury drawn solely from the Kent jury assignment area under RCW 2.36.055 and former King County Local General Rule (LGR) 18.[1]

[1] LGR 18 was suspended effective April 2008. Jackson's trial occurred in January 2008 while the rule was still in effect.

We hold that, while the prosecutor's remarks were improper, because there was no objection and any prejudice resulting from those remarks could have been remedied by a curative instruction, Jackson has waived any claim of error. The trial court also did not err in admitting testimony about the victim's alcohol abuse after the incident since this evidence was relevant and Jackson elicited similar testimony on cross-examination and incorporated the challenged testimony in his closing argument. Finally, permitting Jackson's case to be tried before a jury drawn solely from the Kent jury assignment area neither violated his right to an impartial jury nor deprived him of effective assistance since case law has recently established the constitutionality of the jury selection process under RCW 2.36.055 and former LGR 18.[2] We affirm.

Background

On June 17, 2006, Judy Thompson spent the day with her friends Laura Noftsger and Sina and Joann Ebinger at a Gay Pride softball event sponsored by Alcoholics Anonymous. After the event, Thompson and the Ebingers went to dinner and returned to the Ebingers' house. Thompson, a recovering alcoholic with seven months sobriety at the time, did not consume any alcohol that day.

Thompson left the Ebingers about 10:30 p.m. and on the drive home, she stopped by the grocery store. She arrived at her apartment complex about an

[2] Jackson also contends that the cumulative effect of erroneous rulings deprived him of a fair trial. Because the rulings challenged on appeal were not erroneous, this contention need not be addressed.

hour later and parked her car. A man she did not recognize was standing in the parking lot. Exiting her car, Thompson walked toward her apartment with her arms full of groceries. She heard the man walking behind her and following her up the stairs to her apartment door. When she opened her door, the man "jumped [her] from behind," struck her on the back of the head with a hard object, and pushed her into the apartment. Thompson fell to the floor face down.

She began crying and told the man she was a lesbian, hoping that would stop the attack. Instead, he removed her pants and underwear and vaginally raped her. Although Thompson was unable to fully turn around, she saw that her attacker was an African American man with a medium build. After raping her, the man took her cell phone, a DVD player, a watch, bottles of cologne, a bank card, and some checks. In shock and without a phone, Thompson did not call the police. She stayed inside her apartment, showered repeatedly to "feel clean," and cried. In the morning, she went to the convenience store, purchased a box of wine, and began drinking.

Later that morning, she walked down to the apartment of her neighbor, Steve Braun, because she wanted to notify her employer that she was not coming to work and because she "didn't want to be alone." She told Braun about the rape, but when Braun suggested that she contact the police and seek medical treatment, Thompson told him that she did not want to "go through everything again" and "just wanted to go home." She returned to her apartment

and continued drinking. Braun called the police anyway, and two male police officers arrived later that afternoon at Thompson's door. Intoxicated and upset, Thompson refused to discuss the rape, but she agreed to speak with a female officer. Thompson provided little information to the female officer, who reported that when asked questions about the rape, Thompson "closed her eyes forcefully, and her mouth became very taut." Thompson was also unresponsive to suggestions about seeing a doctor. But she did tell the officer that her attacker was an African American man about five feet 11 inches tall. Thompson also provided the officer with a beer bottle and a plastic bag she found outside her apartment that she thought might belong to the suspect. Both items were sent to the Washington State Crime Laboratory for fingerprint analysis.

Although Thompson planned to attend a barbeque with the Ebingers and Noftsger that evening, she did not call to tell them she was not coming. A week later, Thompson told them that she had been attacked, but she did not say that she had been raped because she "didn't want to relive it." Noftsger testified that she felt a knot on the back of Thompson's head.

Detective Kathy Holt interviewed Thompson about 10 days after the incident. Holt reported that Thompson was withdrawn and "totally shut down" during the interview. Although Holt observed a slight bruise on Thompson's arm, she did not find any injuries to Thompson's head. The case was placed on inactive status until results from the fingerprint analysis established that

Jackson's prints were on the bottle.

Jackson was arrested on December 1, 2006, and charged with first degree rape.[3] He admitted having sex with Thompson but claimed that it was consensual. According to Jackson, he met Thompson in the parking lot as she was securing her car. Jackson testified that Thompson was drunk: he said that he smelled alcohol on her breath and she appeared to be drinking alcohol from a red plastic cup. After flirting with Jackson, she kissed him and invited him into her apartment. Thompson then told Jackson that she was a lesbian but was interested in having sex with an African American man. Thompson performed oral sex on him and engaged in consensual sexual intercourse, after which they both fell asleep. Jackson woke up about an hour later and discovered that two bags of marijuana were missing from his pants. Believing that Thompson had stolen them, he, in turn, stole a watch, a bottle of cologne, and some candy. Jackson denied taking her cell phone, DVD player, and checkbook.

Jackson's trial began on January 14, 2008, before a jury whose members were drawn only from the Kent jury assignment area according to RCW 2.36.055 and former LGR 18. The State called Thompson to the stand, and she testified about the June 17, 2006, incident and her subsequent alcoholic relapse without

[3] The amended charge also shows that the State charged Jackson with child molestation in the second degree. These counts were severed, and Jackson pleaded guilty to the second degree molestation charge. He was sentenced to 42 months in prison on that count.

objection from Jackson. Thompson specifically stated that she had been drinking so heavily at the Gay Pride parade in June 2007 that she passed out and was sent home by Noftsger and the Ebingers in a taxi. Additional witnesses for the State included Joann and Sina Ebinger and Noftsger. All three witnesses testified about Thompson's drinking at the 2007 parade, with Jackson eliciting further details on cross-examination about Thompson's extreme intoxication. Jackson only objected on relevancy grounds when the last two of these witnesses, Sina Ebinger and Noftsger, were asked if they "had any concerns" about statements Thompson made to them at the 2007 parade. Jackson also objected when Noftsger stated that Thompson's alcohol abuse was so severe that she "knew that if [Thompson] kept up like that, she was going to die."

In closing, defense counsel referred to Noftsger's testimony as supporting the theory that Thompson's alcohol abuse led her to do "some things that she would normally never do, and that includes having consensual sex with a man, Robert Jackson." In rebuttal, the prosecutor argued that the weight of evidence favored Jackson's conviction and stated that, unlike defense counsel, she was "pursuing justice." The jury found Jackson guilty of first degree rape, and the court imposed an indeterminate sentence of 160 months to life in prison.

Discussion

I. Prosecutorial Misconduct

To establish prosecutorial misconduct, the defendant must show that the

prosecutor's conduct "was both improper and prejudicial in the context of the entire record and circumstances at trial."[4] The defendant bears the burden of showing both that the conduct was improper and that it caused prejudice.[5] When an appeal alleges misconduct resulting from comments made by the prosecutor in her closing argument, and the defendant fails to object at that time, the issue before an appellate court "becomes whether any curative instructions would have effectively erased the prejudice."[6] In other words, the alleged misconduct will not be reviewed unless the comment is "so flagrant and ill intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct."[7] In examining whether the prejudice could have been remedied by a curative instruction, we "do not look at the comments in isolation, but in the context of the total argument, the issues in the case, the evidence, and the instructions given to the jury."[8]

Jackson contends that the prosecutor's closing statements amount to prosecutorial misconduct that deprived him of a fair trial. Specifically, he points to the prosecutor's remarks disparaging the role of defense counsel, which were made in the following context:

> Now, here's the thing: There's a big difference between defense counsel and I. We sit on opposite sides of the table. I sit

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[4] State v. Hughes, 118 Wn. App. 713, 727, 77 P.3d 681 (2003).
[5] Hughes, 118 Wn. App. at 727.
[6] State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988).
[7] Belgarde, 110 Wn.2d at 507.
[8] State v. Warren, 165 Wn.2d 17, 28, 195 P.3d 940 (2008) (citing State v. Yates, 161 Wn.2d 714, 774, 168 P.3d 359 (2007)).

> on the side of the State. I am pursuing justice. My goal is to prove the case beyond a reasonable doubt.
>
> [Defense counsel] is in a very different situation, as are all defense attorneys. They have to do with what they have. They have to work with the evidence they've got.
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> . . . .
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> Now [defense counsel] is stuck in a different situation than I am, and that situation is unfortunate. It's a situation that the facts create. And how is it unfortunate for [defense counsel]? Well, if only his very smart client hadn't chosen to talk with police, we'd be in a very different situation today.
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> Why is that? Well, if his client hadn't talked to police, if his client hadn't worked with the situation he was stuck in, and said, "Yeah, I had sex with her. Of course I did. It was consensual. I'm a good-looking guy. Why would she say no to me?" [Defense counsel] could have stood before you and said, you know, "ID. State can't prove beyond a reasonable doubt that my client is the guy that did it."
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> But the reality is [defense counsel] is stuck with the facts.

(Emphasis added.) Jackson compares the prosecutor's remarks to the improper statements in State v. Gonzales.[9] There, the prosecutor argued in closing, "I have a very different job than the defense attorney. . . . I have an oath and an obligation to see that justice is served."[10] The defense attorney objected, but the court overruled the objection and stated "that objection is not well taken."[11] The prosecutor continued to develop her theme by arguing that the defense attorney "has a client to represent, I don't. Justice, that's my responsibility and justice is holding him responsible for the crime he committed."[12] On appeal, this court held that the prosecutor's statements were improper because the prosecutor

[9] 111 Wn. App. 276, 45 P.3d 205 (2002).
[10] Gonzales, 111 Wn. App. at 283.
[11] Gonzales, 111 Wn. App. at 283.
[12] Gonzales, 111 Wn. App. at 283.

"disparaged the role of defense counsel and sought to 'draw a cloak of righteousness' around the State's position."[13] But because other grounds existed for reversal, the court did not decide whether the improper statements warranted reversal.[14]

The State properly concedes that the prosecutor's remarks were improper under Gonzales. But the State also correctly points out that Gonzales is distinguishable because defense counsel there objected to the improper statements, preserving the issue for appellate review, and because the trial court overruled the objection, allowing the prosecutor to further develop her argument about defense counsel's role.

Here, unlike in Gonzales, Jackson did not object. In addition, the prosecutor's remarks in this case were not part of a well-developed theme.[15] While the prosecutor's remarks impugned the role of defense counsel, when placed in context, these remarks were directed toward Jackson's proffered defense and emphasized that the weight of evidence favored his conviction.[16] Therefore, any prejudice arising from the remarks could have been eliminated by

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[13] Gonzales, 111 Wn. App. at 282-83 (quoting United States v. Frascone, 747 F.2d 953, 957-58 (5th Cir. 1984)).

[14] Gonzales, 111 Wn. App. at 284.

[15] See also Warren, 165 Wn.2d at 29-30 (holding that improper remarks, which were not part of a well-developed theme, were not so flagrant and ill-intentioned that no instruction could have cured them).

[16] See Warren, 165 Wn.2d at 29 (stating that the weight of evidence favored conviction in concluding there was no prejudice).

an appropriate curative instruction. We conclude that Jackson has not preserved this issue for review.

II. Admission of Testimony Regarding Subsequent Alcohol Abuse

Jackson argues that the trial court erred in admitting testimony by the Ebingers and Noftsger relating to Thompson's alcohol abuse at the Gay Pride parade in June 2007, one year after the alleged rape. This testimony, Jackson contends, was irrelevant and unfairly prejudicial under ER 401 and 403.

In response, the State preliminarily asserts that Jackson waived review by failing to timely object to the Ebingers' testimony. To assign error to a ruling admitting evidence, a party must raise "a timely objection on specific grounds."[17] To be timely, the party must make the objection "at the earliest possible opportunity after the basis for the objection becomes apparent."[18] A review of the record shows that Jackson did not object when Joann Ebinger testified about Thompson's drinking at the 2007 parade. Thus, Jackson has waived any objection regarding Joann Ebinger's testimony.[19]

Jackson did timely object, however, when Sina Ebinger and Noftsger were

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[17] State v. Gray, 134 Wn. App. 547, 557, 138 P.3d 1123 (2006); ER 103(a)(1).

[18] Gray, 134 Wn. App. at 557 (citing State v. Jones, 70 Wn.2d 591, 597, 424 P.2d 665 (1967)).

[19] The State also argues that Jackson invited error by eliciting testimony about Thompson's alcohol abuse from the Ebingers and Noftsger. But the State was the first to elicit testimony about Thompson's alcohol abuse in June 2007, so Jackson arguably did not "open the door."

asked if they had any concerns about Thompson's drinking at the 2007 parade. Accordingly, we address the relevancy of their testimony. To be admissible, evidence must be relevant.[20] Under ER 401, relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Even if relevant, however, evidence may still be excluded under ER 403 "if its probative value is substantially outweighed by the danger of unfair prejudice." Still, "[t]he threshold to admit relevant evidence is very low [and] [e]ven minimally relevant evidence is admissible."[21] The decision to admit evidence is generally within the sound discretion of the trial court, and a trial court's evidentiary ruling is reversed only for abuse of discretion.[22]

In this case, Jackson's defense theory was that Thompson, although a lesbian, consented to sexual intercourse because she was highly intoxicated the night of the incident. The record shows that Jackson sought to use testimony about Thompson's drinking at the 2007 parade to demonstrate the extreme degree of her alcohol abuse. The State established early in the trial that Thompson had severely relapsed in 2007 through Thompson's testimony; Jackson did not object. Joann Ebinger's subsequent testimony corroborated

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[20] ER 402.

[21] State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002) (citing State v. Hudlow, 99 Wn.2d 1, 16, 659 P.2d 514 (1983)).

[22] State v. Atsbeha, 142 Wn.2d 904, 913-14, 16 P.3d 626 (2001).

Thompson's testimony about the incident at the 2007 parade. Again, Jackson did not object. Later, in his cross-examination of Joann Ebinger and Noftsger, Jackson asked both witnesses to supply further details about Thompson's behavior at the 2007 parade—namely, that Thompson had tried to hide her drinking but had been unable to because she was "falling down in the street." Finally, Jackson referred to Noftsger's testimony in closing:

> And, as Laura Noftsger told you, when [Thompson] starts drinking, it's not in a controlled way. She drinks a lot. She gets drunk. And she can't have been happy with herself. I'm sure that by the next morning she was regretting that. But, at this point, on that night, she's drunk when she goes home.
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> . . . And, because she's drunk, she does some things that she would normally never do, and that includes having consensual sex with a man, Robert Jackson.

Jackson's treatment of the testimony relating to Thompson's drinking at the 2007 parade throughout the trial undermines his argument that the statements by the Ebingers and Noftsger were irrelevant and prejudicial.[23] Furthermore, the testimony of Thompson and Joann Ebinger had already related the same facts to the jury when Jackson raised objections to the testimony of Sina Ebinger and Noftsger. Thus, it is unlikely that the challenged testimony had any effect on the verdict. The trial court did not err in admitting testimony about Thompson's alcohol abuse in June 2007.

[23] See State v. Russell, 125 Wn.2d 24, 89, 882 P.2d 747 (1994) (stating that the incorporation of the prosecutor's improper remarks into the defense counsel's closing argument undermined the claim that the defendant was prejudiced by the prosecutor's misconduct).

III. Jury Selection Process

Jackson contends that the trial court should have ordered a jury drawn from the entire county rather than from only the Kent jury assignment area.[24] He asserts that the jury selection process under RCW 2.36.055 and former LGR 18 violates article I, section 22 of the Washington State Constitution.[25]

RCW 2.36.055 provides in part:

> In a county with more than one superior court facility and a separate case assignment area for each court facility, the jury source list may be divided into jury assignment areas that consist of registered voters and licensed drivers and identicard holders residing in each jury assignment area. Jury assignment area boundaries may be designated and adjusted by the administrative office of the courts based on the most current United States census data at the request of the majority of the judges of the superior court when required for the efficient and fair administration of justice.

To implement RCW 2.36.055, the King County Superior Court promulgated LGR 18, which roughly designates the "Seattle jury assignment area" as including all of the city of Seattle and everything north of Interstate 90 and the "Kent jury assignment area" as including everything else.[26] The courts may order "a panel drawn from the whole county 'whenever required for the just and efficient

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[24] During pretrial motions, defense counsel stated that he did not intend to challenge the constitutionality of LGR 18. We need not address whether Jackson has preserved this issue for review since the State did not brief this argument and asserts that State v. Lanciloti, 165 Wn.2d 661, 201 P.3d 323 (2009), disposes of Jackson's challenge.

[25] Article I, section 22 states that criminal defendants have the right to "a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed." (Emphasis added.)

[26] Lanciloti, 165 Wn.2d at 665.

administration of justice.'"[27]

Our Supreme Court recently rejected an argument identical to Jackson's in State v. Lanciloti.[28] In that case, Lanciloti was to be tried for possession of methamphetamine at the King County courthouse in downtown Seattle.[29] He sought a jury trial and challenged the constitutionality of the statute and court rule.[30] Specifically, Lanciloti argued that the requirement under article I, section 22 that juries be "of the county" meant that juries must be "of the whole county."[31] In affirming the trial court's rejection of Lanciloti's challenge, our Supreme Court held that "the legislature was within its power to authorize counties with two superior courthouses to divide themselves into two districts."[32] Accordingly, Jackson's challenge fails.

Lanciloti also disposes of Jackson's challenge to the jury selection process under the statute and court rule under the Sixth Amendment. In addressing a facial challenge to RCW 2.36.055 and its implementation under the federal constitution, the Lanciloti court stated that "federal Sixth Amendment jurisprudence prohibits the systemic exclusion of 'distinctive groups' from the jury pools."[33] Lanciloti presented evidence that the populations of the two King

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[27] Lanciloti, 165 Wn.2d at 665-66 (quoting LGR 18 e(2)).
[28] 165 Wn.2d 661, 201 P.3d 323 (2009).
[29] Lanciloti, 165 Wn.2d at 666.
[30] Lanciloti, 165 Wn.2d at 666.
[31] Lanciloti, 165 Wn.2d at 667.
[32] Lanciloti, 165 Wn.2d at 671.
[33] Lanciloti, 165 Wn.2d at 671 (citing Duren v. Missouri, 439 U.S. 357, 363-64, 99 S. Ct. 664, 58 L. Ed. 2d 579 (1979)).

County jury districts varied based on income, homeownership, and education.[34] Assuming that the jury source lists reflected these differences, the court rejected Lanciloti's challenge on grounds that he had not carried "his burden of showing that these demographic differences amount to a systemic exclusion of a distinctive group."[35] In this case, Jackson raises the same challenge supported only by his assertion that "[t]he statute and [court] rule in this case systematically and effectively exclude from jury service a distinct segment of the population of King County in violation of the state and federal constitutions." Following Lanciloti, his challenge fails.

Alternatively, Jackson argues that defense counsel was ineffective in failing to assert his constitutional right to a jury of the county under the state and federal constitutions. When reviewing a claim of ineffective assistance, our courts begin with the strong presumption that counsel's representation was effective.[36] To overcome this presumption, the defendant must show both deficient performance and resulting prejudice.[37] The defendant establishes deficient performance if no "legitimate strategic or tactical reasons support[s] the challenged conduct."[38] The defendant demonstrates prejudice if there is "a

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[34] Lanciloti, 165 Wn.2d at 671.

[35] Lanciloti, 165 Wn.2d at 671-72.

[36] State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

[37] In re Pers. Restraint of Hubert, 138 Wn. App. 924, 928, 158 P.3d 1282 (2007) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996)).

[38] McFarland, 127 Wn.2d at 336.

reasonable probability that, but for counsel's unprofessional errors, the result would have been different."[39] Our courts need not "address both prongs of the ineffective assistance test if the defendant's showing on one prong is insufficient."[40]

Jackson contends that the failure of his counsel to challenge the jury selection process as a violation of his right to a jury of the county is similar to the ineffective assistance rendered in In re Personal Restraint of Orange.[41] But in that case, counsel for Christopher Orange failed to raise the issue of courtroom closure as a violation of Orange's public trial right, which our Supreme Court had firmly established was presumptive prejudicial error warranting a new trial.[42] Thus, the court held that Orange was denied effective assistance.[43] In this case, there existed no similar precedent establishing the unconstitutionality of the jury selection process under RCW 2.36.055 and former LGR 18. Jackson's counsel decided not to raise the issue of jury selection, fully aware of the pending litigation on LRG 18 and the superior court decision finding the rule unconstitutional. Given our Supreme Court's resolution of this issue, Jackson can show no prejudice caused by his counsel's failure to raise such a challenge.

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[39] Hubert, 138 Wn. App. at 928 (citing State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987)).

[40] State v. Foster, 140 Wn. App. 266, 273, 166 P.3d 726 (2007) (citing Strickland, 466 U.S. at 697).

[41] 152 Wn.2d 795, 100 P.3d 291 (2004).

[42] Orange, 152 Wn.2d at 814.

[43] Orange, 152 Wn.2d at 814.

Conclusion

The prosecutor's closing remarks impugning defense counsel were improper. But because there was no objection and any prejudice resulting from those remarks could have been erased by a curative instruction, Jackson has waived any claim of error. In addition, the trial court did not err in allowing testimony about Thompson's alcohol abuse at the 2007 parade since it was relevant and Jackson elicited similar testimony on cross-examination and incorporated the challenged testimony in his closing argument. Finally, permitting Jackson's case to be tried before a jury drawn solely from the Kent jury assignment area did not violate Jackson's right to a jury of the county or deprive him of effective assistance, as recently established by our Supreme Court in Lanciloti.

Affirmed.

Leach, J.

WE CONCUR:

Cox, J.